IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CAROLYN A. FLINT	:	**CIVIL ACTION**
	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	**NO. 98-95**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **March 17, 2000**

Plaintiff Carolyn Flint ("Ms. Flint") sued the City of Philadelphia ("City") for discrimination based on race, sex, and age under Title VII of the Civil Rights Act of 1991. A non-jury trial was held; because: 1) Ms. Flint's claims are barred by the Statue of Limitations; and 2) Ms. Flint did not prove her claims by a preponderance of the evidence, judgment will be entered in favor of the City. In accordance with Federal Rule of Civil Procedure 52(a), the court enters the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Ms. Flint is a 56 year old African American female who has been employed by the City since November, 1961.

2. In July, 1990 Ms. Flint was an accountant in the City's public library when an interdepartmental, city-wide announcement was posted for a job opening for three "Budget Analyst Specialist" ("BAS") positions in the Budget Bureau of the City Finance Department. The posting advertised a prerequisite for

the BAS position: central budget experience (working with the budget of more than one department's operating and/or capital budget), or any equivalent combination of education and experience determined by the Personnel Department to be acceptable. The posting also informed prospective applicants that a civil service test would be required of all qualified applicants.

3. Ms. Flint and at least five other women applied for the BAS position and were pre-approved to sit for the examination because they possessed prior budget experience in other city departments. Ms. Flint took the examination in August, 1991.

4. The Personnel Department, posting the BAS job announcement in July, 1990, advertised that people without central budget experience could sit for the examination, and allowed people without central budget experience to sit for the examination. The Budget Bureau did not intend any "equivalent combination of education and experience" to satisfy the BAS prerequisites; it sought only candidates with central budget experience, and failed to correct the job posting until after the examination was administered.

5. On October 31, 1991 Ms. Flint received a letter stating she was tested in error and denying her one of the BAS positions. Ms. Flint and four other applicants who were "examined in error," were stricken by the Personnel Department from the eligibility

list.

6. All copies of Ms. Flint's examination were later lost by the City; her score and ranking among test takers are not available.

7. Because Ms. Flint had prior budget experience and believed she did well on her examination, she filed a written grievance with her union in January, 1992, under the provisions of her collective bargaining agreement.

8. Ms. Flint's union brought her case to arbitration.[1] The arbitrator, ruling for Ms. Flint, awarded her back pay and ordered the City to promote her to a Budget Analyst Specialist. The Court of Common Pleas affirmed the arbitrator's finding of City liability and the award. On appeal, the Commonwealth Court agreed that Ms. Flint was improperly denied consideration for the promotion, but nevertheless reversed the orders of the arbitrator and court below because assigning Ms. Flint a position on the now expired eligibility list exceeded the remedial power of the arbitrator. Ms. Flint's Application for Reargument with the Commonwealth Court was denied.

9. Ms. Flint claims she did not know she was the victim of discrimination until her November, 1994 grievance arbitration, at which she learned (allegedly for the first time) that three white

[1] The arbitrated issue (whether the City violated Ms. Flint's rights under her union contract) is distinct from her instant claims of discrimination under federal law.

males under age 40 received the BAS positions. Ms. Flint filed an EEOC complaint on July 25, 1995, and was issued a right to sue letter in October, 1997. Ms. Flint filed her federal complaint on January 8, 1998.

10. Between 1991 and her 1994 arbitration, Ms. Flint worked near the Personnel Department, had access to a telephone, and was entitled to morning, lunch, and afternoon breaks. She had ample time and opportunity to contact the Personnel Department to learn the status of the promotion process and to learn the identities of the successful BAS applicants. She knew or reasonably should have known the identities, ages, sex, and race of the successful applicants years before her 1994 arbitration.

11. The three BAS positions went to white males, Henry Wallerstein, Jeffrey McClelland, and Robert Fitzmartin, each under 40 years old in 1991. Messrs. Wallerstein, McClelland, and Fitzmartin were lower level Budget Department employees when the BAS opening arose; the BAS position was an intra-department promotional opportunity for them.

12. The relevant BAS positions were created to effect a promotion for Messrs. McClelland, Wallerstein, and Fitzmartin during a period of City fiscal difficulty; a hiring and wage freeze prevented increasing their salaries or hiring additional employees. The Budget Bureau considered internal promotions effective to avoid the wage freeze while retaining and rewarding

Messrs. McClelland, Wallerstein, and Fitzmartin during the financial crisis. In so doing, the Budget Bureau abused Civil Service Regulations by creating the BAS job openings, and attempting to prevent anyone except for Messrs. McClelland, Wallerstein, and Fitzmartin from qualifying for the positions.

13. To give a promotion or create new positions like BAS under then-existing Civil Service Regulations, the Budget Bureau was required to make a job posting/announcement and offer an examination through the Personnel Department.

14. The Personnel Department posted a notice of an open, inter-departmental examination for the BAS position. The posting was inconsistent with the Budget Bureau's intent to increase Messrs. McClelland, Wallerstein, and Fitzmartin's wages by intra-departmental promotion.

15. Ms. Flint claims the reasons offered by the City for her removal from the BAS eligibility list were a pretext for discrimination, and that she was denied the promotion because of her race, age, and/or sex. Ms. Flint claims she had the requisite work experience for the job, because she had completed complex budgeting tasks as an accountant at the public library and other City positions.

16. At the time of trial, the Budget Bureau of the Finance Department employed five Budget Analyst Specialists, one supervisor, one deputy director, and two or three additional

employees. In 1991, the Budget Bureau had six analysts, a supervisor, a deputy director, and a director. There have been three African American employees employed in the Budget Bureau since 1985, one of whom was a woman.

Discussion

I. Statute of Limitations

42 U.S.C. § 2000e-5(e) allows a claimant to bring an action within 180 days after an alleged act of discrimination. If the claimant initially filed a complaint with a state or local agency with the authority to adjudicate her claim, the deadline for filing a charge of employment discrimination with the EEOC is extended to 300 days. See 42 U.S.C. § 2000e-5(e).

On May 6, 1998 the City's motion to dismiss for failure to file a charge with the Equal Employment Opportunity Commission ("EEOC") within the deadline set by 42 U.S.C. § 2000e-5 was denied. The statute of limitations began to run when Ms. Flint's cause of action accrued on or about October 31, 1991, but the court could not then decide whether the equitable tolling doctrine extended the deadline for Ms. Flint to file a discrimination charge.

The equitable tolling doctrine provides that it "may be appropriate [to toll the limitations period:] (1) where the defendant has actively misled the plaintiff respecting the plaintiff's cause of action; (2) where the plaintiff in some

extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum." New Castle County v. Halliburton Nus Corp., 111 F.3d 1116, 1125-26 (3d Cir. 1997) (quoting Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1387 (3d Cir. 1994)).

To benefit from the equitable tolling doctrine, Ms. Flint must establish that she could not have discovered the essential factual information bearing on her claim by the exercise of reasonable diligence. New Castle County, 111 F.3d at 1125; Oshiver, 38 F.3d at 1390; Cada v. Baxter Healthcare Corp., 920 F.2d 446, 452 (7th Cir. 1990), cert. denied, 501 U.S. 1261 (1991). "The plaintiff who fails to exercise this reasonable diligence . . . lose[s] the benefit of" the equitable tolling doctrine. Oshiver, 38 F.3d at 1390.

In Oshiver, the plaintiff filed a charge of discrimination with the EEOC 440 days after she was terminated from a law firm allegedly because the firm "did not have sufficient work to sustain her position." Oshiver, 38 F.3d at 1384. A year later, she learned that the firm had hired a male attorney "shortly after her dismissal, . . . to take over her duties." Id. The Court of Appeals found there were issues of fact: whether the plaintiff had been misled when she was told she was terminated because of lack of work; whether plaintiff was aware that she was

replaced by a male employee, a "critical fact that would have alerted a reasonable person to the alleged unlawful discrimination;" and whether a person in her position with a reasonably prudent regard for her rights would have learned of the allegedly discriminatory act. Id. at 1392. The allegations, giving Oshiver the benefit of all reasonable inferences, were sufficient to raise the possibility of equitable tolling, and the motion to dismiss based on the statute of limitations was denied.

At the argument on the City's motion to dismiss, the facts in this action closely resembled those in Oshiver. It is now clear that while the City mislead Ms. Flint about the reason for her removal from the eligibility list, she could have and should have discovered that the successful candidates for the BAS positions were three white men under age 40. It is hard to believe Ms. Flint did not seek out this public information in view of her intensity in obtaining the position but, even if true, it is legally inexcusable. She had ample time and opportunity to call, write to, or visit the Personnel Department between 1991 and 1994 to obtain a list of successful candidates. Ms. Flint's claim that her union directed her not to investigate pending arbitration, while possible, is not a plausible excuse; a person with such prudent regard for her rights as Ms. Flint would have taken steps to learn of and react to the City's allegedly discriminatory acts.

Ms. Flint could have and should have known that she was the victim of alleged discrimination on or around October 31, 1991. She did not file a charge of discrimination with the EEOC until July 25, 1995, several years after the deadline under 42 U.S.C. § 2000e-5(e). Equitable tolling does not apply. Ms. Flint is barred from recovery under Title VII.

II. Title VII

Even if Ms. Flint's substantive claims could be considered, she would not prevail. To state a prima facie claim under Title VII for racial and sex discrimination, plaintiff must prove: 1) she is a member of a protected class; 2) she was qualified for the position for which she applied; 3) she was not hired despite her qualifications; and 4) after her rejection, the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications. See Pivirotto v. Innovative Sys., Inc., 191 F.3d 344, 351 (3d Cir. 1999). To state a prima facie claim under Title VII for age discrimination,[2] plaintiff must prove: 1) she was 40 years of age or older; 2) she was passed over for a promotion; 3) she was

[2] Though the Eleventh Amendment bars age discrimination suits by a state employee against a state in federal court, see Kimel v. Florida Bd. of Regents, __ U.S. __, 120 S.Ct. 631 (2000), the Eleventh Amendment does not bar suits against municipalities or political subdivisions of a state. See, e.g., Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977); Lincoln County v. Luning, 133 U.S. 529 (1890); Bolden v. Southeastern Pa. Trans. Auth., 953 F.2d 807 (3d Cir. 1991).

qualified for the job; and 4) she was replaced by a person sufficiently younger to create an inference of age discrimination. See Showalter v. University of Pittsburgh Med. Ctr., 190 F.3d 231, 234 (3d Cir. 1999).

If plaintiff establishes a prima facie case, the defendant, though not assuming the burden of persuasion, assumes a burden to produce some evidence of a legitimate, nondiscriminatory reason for the adverse employment action. See Pivirotto, 191 F.3d at 352 n.4; Showalter, 190 F.3d at 234. The defendant's burden at this stage is "relatively light"; it is satisfied if the defendant articulates any legitimate reason for the adverse employment action, and defendant need not prove that the articulated reason actually motivated the adverse employment action. See Woodson v. Scott Paper, 109 F.3d 913, 920 n.2 (3d Cir. 1997). Defendant must produce evidence which "fairly could be recognized as a reasonable basis for a refusal to hire." McDonnell Douglas Corp. v. Green, 411 U.S. 803-04 (1973). The purpose of defendant's production at this stage is to introduce evidence which, taken as true, would permit the conclusion that there was a nondiscriminatory reason for the adverse action. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). Defendant-employer's reasons must be presented "with sufficient clarity and detail to afford the plaintiff-employee a fair opportunity to pierce the proffered reasons with facts of

record." Johnson v. Women's Christian Alliance, 76 F. Supp.2d 582, 586 (E.D. Pa. 1999).

If the defendant makes its production, the burden remains with plaintiff to prove, by a preponderance of the evidence, that the proffered reason was pretextual and that the unlawful discrimination was the real reason for the employment action. See Pivirotto, 191 F.3d at 352 n.4; Showalter, 190 F.3d at 234. Pretext exists when the factfinder is convinced that both the defendant's reason was false, and that discrimination was the real reason. See Fuentes v. Perskie, 32 F.3d 759, 763 (3d Cir. 1994). The more generalized and subjective the justification, the more vulnerable it is to a finding of "pretext." Compare Taggart v. Time, Inc., 924 F.2d 43 (2d Cir. 1991) with EEOC v. Insurance Co. of No. America, 49 F.3d 1418 (9th Cir. 1995).

A. Plaintiff's Prima Facie Case

A 56 year old African American woman, Ms. Flint is a member of three protected classes. Ms. Flint proved she was excluded in favor of three white male applicants, at least ten years her junior. Ms. Flint also proved she was qualified for one of the erroneously posted BAS positions, based on her years of accounting experience in other City departments and her positive performance therein. The City is bound by the action of the Personnel Department in posting the job for persons with the equivalent of central budget experience. The City did not hire

Ms. Flint despite her qualifications.

Ms. Flint proved that the City eventually hired persons with qualifications similar to hers. Though Ms. Flint had limited experience with budgetary accounting for multiple city departments, and Messrs. McClelland, Wallerstein, and Fitzmartin had more extensive accounting experience, education, and experience budgeting for multiple departments, Ms. Flint had sufficient qualifications to perform in a BAS position. The showing required for a prima facie case refers to minimal or absolute, rather than relative or comparative, qualifications. See Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989) (plaintiff need not prove that she was better qualified than the white employee(s) who received the contested promotion). Ms. Flint has stated a prima facie case of sex, race, and age discrimination by a preponderance of the evidence.

B. Production of Legitimate, Nondiscriminatory Reason

The burden to produce some evidence of a legitimate, nondiscriminatory reason for the adverse employment action shifted to the City. A "legitimate, nondiscriminatory" reason for an adverse employment action rebuts the prima facie case even if it is illegal or illogical, as long as it is not linked to race, sex, or age. See, e.g., Hazen Paper Co. v. Biggins, 507 U.S. 604, 612 (1994) ("[I]t cannot be true that an employer who fires an older black worker because the worker is black thereby

violates the ADEA. The employee's race is an improper reason, but it is improper under Title VII, not the ADEA."); Harold S. Lewis, Civil Rights and Employment Discrimination Law § 4.4 (1997) ("most courts have viewed as 'legitimate' virtually any reason the employer shows it relied on that can be distinguished from [age, sex, or race]"). Whatever the employer's decisionmaking process, "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." Biggins, 507 U.S. at 612.

The arbitrator and two Pennsylvania courts have held the City's effort to evade the Civil Service procedures was an abuse of discretion. Nevertheless, the City's acts were unrelated to Ms. Flint's age, race, and sex; they were related to rigging the Civil Service system to grant Messrs. McClelland, Wallerstein, and Fitzmartin promotions and raises not then permitted. The City's treatment of Ms. Flint was the unfortunate by-product of the Budget Department's abuse of the Civil Service System to avoid the law. The City met its burden by producing evidence of a nondiscriminatory reason for the adverse employment action.

C. Plaintiff's Proof of Pretext

The burden next rests with Ms. Flint to prove, by a preponderance of the evidence, that the City's proffered reason was a pretext for unlawful discrimination. Pretext can be shown

through either a showing of affirmative evidence, or by convincing the finder of fact that the proffered reason is an implausible explanation for the challenged decision. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Ms. Flint produced no affirmative evidence of pretext; the City's nondiscriminatory defense was not weakened by any direct evidence introduced by Ms. Flint. Ms. Flint did not convince the court that the City's stated reason was implausible. The court does not condone or encourage such abusive acts by the City, but is convinced the Budget Department merely attempted to reward Messrs. McClelland, Wallerstein, and Fitzmartin during a time of financial restraints on its doing so. Discrimination is not a logical inference from the alleged adverse conduct; illegality and impropriety is the logical inference therefrom.

There were African Americans, women, and persons over 40 years old in the Finance and Budget Departments from 1985 through 1992; Ms. Flint did not prove the City had an intent, policy, or practice to exclude members of these protected classes from the Budget Department. Ms. Flint did not prove discrimination because of age, race, or sex.

Even if the merits were reached, Ms. Flint would not prevail. However, this trial has revealed deplorable actions by the Finance Department to abuse the City's Civil Service system. Ms. Flint and others prepared for and sat for an examination they

could never pass. Years of dissent and litigation followed. A civil service system that allows evasion to the detriment of its covered employees demands remediation. This court cannot grant Ms. Flint a remedy, and the Pennsylvania courts will not, but the result is hardly a victory for the City.[3]

Any facts in the Discussion section not found in the Facts section are incorporated by reference therein.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and subject matter.

2. Ms. Flint's action is barred by the Title VII statute of limitations, 42 U.S.C. § 2000e-5(e).

3. Even if the statute of limitations did not bar her action, Ms. Flint failed to prove the City's nondiscriminatory reason for the adverse employment action was a pretext for prohibited discrimination.

4. In view of the decision on liability, there is no need to consider damages. This action will be marked closed.

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[3] Ms. Flint was pro se, but she did an excellent job presenting her case. The outcome is no reflection upon Ms. Flint's personal abilities. Ms. Flint was immeasurably aided by her prior attorney, Gerald J. Pomerantz, Esq., who despite Ms. Flint's views, represented her competently.

This disposition has no bearing on Ms. Flint's recently filed retaliation charge against the City.

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CAROLYN A. FLINT	:	**CIVIL ACTION**
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v.	:	
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CITY OF PHILADELPHIA	:	**NO. 98-95**

ORDER

AND NOW this 17th day of March, 2000, in accordance with the attached findings of fact and conclusions of law, in accordance with Fed. R. Civ. Proc. 58,

It is **ORDERED** that judgment is entered in favor of defendant and against plaintiff.

It is **FURTHER ORDERED** that plaintiff's motion to compel appearance of John J. Guerin, Ph.D., is **DENIED AS MOOT**.

It is **FURTHER ORDERED** that this action shall be marked **CLOSED FORTHWITH**.

Norma L. Shapiro, S.J.